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No. 960

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In the Supreme Court of the United States

October Term, 1957

JUAN A. ORTA, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1-7) is reported at 253 F. 2d 312.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1958 (Pet. 13). On April 18, 1958, Mr. Justice Black entered an order (the application for which had been filed on April 17th, within the 30-day period following the entry of the Court of Appeals' judgment) extending the time for filing a petition for a writ of certiorari to April 28, 1958,

and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances here presented, a trial for perjury before a grand jury was barred by reason of the fact that the giver of the perjured testimony had not been warned of his privilege against self-incrimination.

STATEMENT

On March 27, 1957, an indictment in four counts (R. 1-7) was returned in the United States District Court for the Southern District of Florida charging petitioner with the commission of perjury before the federal grand jury for that District. On April 24, 1957, petitioner moved to dismiss the indictment on the ground that he had not been apprised prior to his appearance before the grand jury of his right not to be compelled to give testimony against himself (R. 7-9). Following a hearing (R. 27-43), the motion to dismiss was granted by the District Court without opinion (R. 16, 43). On appeal by the Government under the Criminal Appeals Act to the Court of Appeals for the Fifth Circuit, the judgment of the District Court was reversed and the cause remanded for further proceedings (Pet. 13). The petition for a writ of certiorari seeks review of this judgment.

The pertinent facts may be summarized as follows:

Petitioner's allegedly perjurious grand jury testimony was given on January 10, 11, and 15, 1957

(R. 4, 5, 6). Prior to his being called, on January 9, 1957, the opening day of the grand jury's investigations, the following statement was made to the grand jury by the Chief of the Registration Section of the Internal Security Division of the Department of Justice, by way of explanation of the subject matter into which the Government proposed to have the grand jury inquire (R. 20-21):

> My name is Nathan Lenvin and I am the Chief of the Registration Section of the Internal Security Division of the Department of Justice. My main responsibility is the enforcement and administration of the Foreign Agents Registration Act of 1938, as amended, and the Voorhees [*sic*] Act. The Foreign Agents Registration Act requires the registration with the Attorney General of any person who acts within the United States as an agent of a foreign principal, and the Voorhees [*sic*] Act requires the registration with the Attorney General of an organization which advocates the overthrow of a government, not necessarily the government of the United States, by the use of force or violence, or which advocates the use of such means for the overthrow of a government.
>
> We have received information that there are individuals and organizations within the United States who had been acting as agents of an underground movement in Cuba and who had advocated the violent overthrow of the Batista Government in Cuba. At this time this information is not sufficiently specific to warrant a request of the grand jury for the return of an indictment, but we are anxious to conduct an investigative proceeding before this grand jury

> to determine exactly, if we can, what these groups and individuals have been doing within the United States which may be in violation of federal statutes. It may be that at the close of this proceeding the evidence will be sufficient to warrant submitting this matter for your consideration for the return of an indictment, but at this stage of the proceeding we are simply engaged in an exploratory procedure.

Petitioner's allegedly perjurious testimony consisted of his negative answers to the following questions: (1) whether he had "arrange[d] for the transportation of a certain number of Cubans from New York to Miami" (count 1, R. 4, 21-22); (2) whether he had made airline reservations with Eastern Airlines for nineteen individuals on December 7, 1956 (count 2, R. 5, 24); (3) whether he had been "in the Pan American Air Lines ticket office at Flagler Street and Biscayne Boulevard" on December 16, 1956 (count 3, R. 5-6, 23); and (4) whether he had been in the latter office on December 9, 1956 (count 4, R. 6-7, 22).

Petitioner's motion to dismiss the indictment (R. 7-9) stated that he had not appeared voluntarily before the grand jury but pursuant to subpoena; that he was a foreigner, unfamiliar with the English language; that he was unaware at the time of his appearance that he was "clothed with certain rights, immunities and priviledges [*sic*] among which was included the right to remain silent, right to consult an attorney and immunities in general"; that the Government had not advised him of his rights; and

that his testimony had been "elicited from him by virtue of the said non disclosure of his rights by the Government," which thus, through "compulsion and undue advantage," had placed him "in jeopardy of his liberty" in violation of his "right to immunity and to remain silent as granted by the fifth amendment" (R. 8). In an affidavit (R. 9-11) accompanying the motion to dismiss, petitioner stated that, had he been aware of his rights when he appeared before the grand jury, he "would have chosen either to remain silent or to take any immunity offered" (R. 10).

On July 15, 1957, the District Court, following argument of the motion to dismiss, and after examining petitioner's testimony before the grand jury (which the court had ordered transcribed and submitted to it), denied the motion, but, on its own motion, directed that a hearing be held at a later date at which petitioner would be afforded an opportunity to present evidence "upon the voluntariness of the giving of his testimony to the Grand Jury" and for the purpose of enabling the court to determine "whether that testimony should be suppressed from evidence in this or any other criminal proceeding" (R. 12-13).

Some time thereafter, government counsel were asked to supply answers to the following questions (R. 13-14):

1. Did the defendant understand English at the time he was before the Grand Jury?
2. Was the defendant warned, outside of the transcript of testimony, of his Constitutional

right to refuse to answer questions which might tend to incriminate him?

3. Did the defendant have legal counsel prior to testifying before the Grand Jury?
4. Irrespective of legal counsel, did the defendant understand his Constitutional rights, himself?

On August 8, 1957, the Government formally advised the court that it was "not in a position to answer any of the four questions either in the affirmative or the negative" (R. 13, 14).

At a hearing held on August 20, 1957 (R. 27-43), petitioner testified that he had resided in the United States for two years, having previously lived in his native Cuba (R. 40, 42); that he had attended the University of Havana in Cuba (R. 40);[1] that he had but slight knowledge of the English language (R. 40);[2] that he understood the interpreter when he testified before the grand jury, and the nature of the oath which he took to tell the whole truth and nothing but the truth (R. 41-42); that, however, he had not retained an attorney prior to his appearance before the grand jury (R. 40), and was not aware of any of his rights at that time (R. 40-41); and that if he had known of his right "to remain silent" he would not have "spoken in that Grand Jury room" (R. 43).

[1] Another witness on petitioner's behalf testified that petitioner had "a teacher's degree" from this University, and that in Cuba he would be referred to as "Doctor Orta" (R. 35).

[2] Petitioner's supervisor at his place of employment also testified to petitioner's limited command of English (R. 29-31).

At the conclusion of the hearing, the District Court (Choate, D.J.), following oral argument, indicated that he would "suppress the testimony, right, wrong or indifferent" (R. 43). On the same date, August 20, 1957, accordingly, he entered an order, without opinion, "suppress[ing]" petitioner's grand jury testimony and "dismiss[ing]" the indictment (R. 16).

On March 18, 1958, as previously indicated, the Court of Appeals, holding that this action was erroneous for the reasons set forth in an opinion filed with its judgment (Pet. App. 1-7), reversed this judgment of the District Court and remanded the cause for further proceedings "not inconsistent with" its opinion (Pet. 13).

ARGUMENT

As observed by the court below (Pet. App. 7), the factual situation and issue in the instant case are "almost identical" with the factual situation and issue in *United States* v. *Parker*, 244 F. 2d 943 (C.A. 7), certiorari denied, 355 U.S. 836. See our Brief in Opposition to the granting of certiorari in that case, No. 351, this Term, pp. 5-7. Petitioner urges here, as the petitioner urged in *Parker*, that "his prosecution for perjury was barred by reason of the fact that he was not informed of his constitutional privilege against self-incrimination at the time of his appearance before the grand jury, when, he argues, he was the unmistakable target of the investigation" (Br. in Opp., No. 351, p. 5). "To this argument"—here as there—"there are two answers: (1) petitioner was

not the target of the investigation but a witness; (2) the failure to inform him of his privilege, whatever effect such omission might have on an indictment against him with relation to the subject matter of the investigation, did not give petitioner a license to commit perjury and immunity from prosecution for perjury" (*ibid.*).

1. The record fails to show that petitioner was "the target of the investigation" of the grand jury before which he was called to testify. That investigation, as the opening statement to the grand jury by the Chief of the Justice Department's Registration Section reflects (*supra*, pp. 3-4), was a broad inquiry into activities by "individuals and organizations within the United States", about whom the Department of Justice had received information indicating that they were active in "an underground movement in Cuba" against the Batista regime, to determine whether violations of the Foreign Agents Registration Act and the Voorhis Act had occurred or were occurring. The record reflects, at most, that the Department, having reason to believe that petitioner might have pertinent information on the subject, subpoenaed him to tell what he knew. As we pointed out in our Brief in Opposition in the *Parker* case (at pp. 5-6), in *United States* v. *Scully*, 225 F. 2d 113 (C.A. 2), certiorari denied, 350 U.S. 897, the grand jury, before it called Scully to testify in connection with an investigation of frauds in government purchases, knew that Scully had ordered bids to be rigged on twenty occasions and had deposited in his bank account $4,000 more than he had earned. Even so, the

Court of Appeals, in upholding the district court's denial of Scully's motion to dismiss an indictment charging him with participation in fraud, found it far from clear that Scully had been marked for prosecution, and held (at p. 116) that—

> * * * the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment, when summoned to give testimony before a Grand Jury.

The present petitioner, like Parker, was much less clearly marked for prosecution than was Scully.[3]

2. In any event, as we noted in our *Parker* brief (at p. 6), even if petitioner should have been warned, and even assuming the very debatable proposition that failure to warn a witness may be a ground for dismissing an indictment against him with relation to the subject matter of the investigation, we think it is clear that, when petitioner did undertake to testify, he had no license to commit perjury and could not

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[3]As observed by the court in *Scully*, 225 F. 2d at 116, since the grand jury "is not charged with the duty of deciding innocence or guilt," its proceedings "have never been conducted with the assiduous regard for the preservation of procedural safeguards which normally attends the ultimate trial of the issues. Thus, in such proceedings, there is no right to counsel, no right of confrontation, no right to cross-examine or to introduce evidence in rebuttal, and ordinarily no requirement that the evidence introduced be only such as would be admissible upon a trial." Cf. *Costello* v. *United States*, 350 U.S. 359.

acquire immunity from prosecution for his perjury. See authorities collected at *id.*, pp. 6-7.[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1958.

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[4] The early district court decision in *United States* v. *Bell*, 81 Fed. 830 (W.D. Tenn., 1897), upon which the petitioner, like the petitioner in *Parker*, relies to establish the rule that the testimony of a witness uninformed of his constitutional right may not be the basis of an indictment for perjury, has, as noted in our *Parker* brief (at p. 7), not been followed.

Petitioner, an educated man with a university degree (fn. 1, *supra*, p. 6), argues that he was prejudiced by his unfamiliarity with the English language (Pet. 6, 11). However, he admitted that he fully understood the oath which he took before the grand jury (R. 42), and the record demonstrates his ability to understand questions as propounded through an interpreter (R. 21-24, 39-43).

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